

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

THIS DOCUMENT RELATES TO ALL
ACTIONS.

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris
Magistrate Judge Marianne B. Bowler

**PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE TESTIMONY BY
NON-MASSACHUSETTS THIRD-PARTY PAYORS, OR, IN THE
ALTERNATIVE, TO PERMIT ALL PARTIES TO INTRODUCE
TESTIMONY FROM NON-MASSACHUSETTS THIRD-PARTY PAYORS**

Plaintiffs, by their undersigned counsel, respectfully move this Court for an order excluding testimony by non-Massachusetts third party payors (“TPPs”), or, in the alternative, permitting all parties to introduce testimony from non-Massachusetts TPPs. As grounds for the foregoing, Plaintiffs state as follows:

1. Defendants have taken approximately sixty (60) depositions of third party payor (“TPP”) class members. Plaintiffs therefore anticipate that Defendants may attempt to call some of those TPP class members (Class 2 or Class 3) at trial. Because many of the TPPs whose depositions were taken were not Massachusetts TPPs, and this Court has for the time being only certified classes of Massachusetts TPPs, Plaintiffs respectfully ask this Court to enter an order either (1) precluding Defendants from calling non-Massachusetts TPPs at trial or (2) allowing *both* Plaintiffs and Defendants to call non-Massachusetts TPPs at trial.

2. Any purported knowledge acquired by TPPs not within the Court’s definitions for those Classes 2 and 3 – which are limited to Massachusetts TPPs – is completely irrelevant to the knowledge possessed by Massachusetts TPPs. As a matter of fairness, it would be improper to

allow Defendants to impute the collective knowledge of all TPPs onto Massachusetts TPPs collectively or to any individual Massachusetts TPP.

3. On the other hand, should this Court permit Defendants to introduce this testimony, Rule 16 of the Federal Rules of Civil Procedure permits this Court to enter an order allowing Plaintiffs to do the same.

WHEREFORE Plaintiffs respectfully request that this Court enter an order either (1) excluding testimony from non-Massachusetts TPPs at trial or (2) allowing both Plaintiffs and Defendants to call a limited number of non-Massachusetts TPPs at trial, and all other relief that this Court deems just and appropriate.

DATED: October 3, 2006

By /s/ Steve W. Berman

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CERTIFICATE OF SERVICE BY LEXISNEXIS FILE & SERVE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on October 3, 2006, I caused copies of **PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE TESTIMONY BY NON-MASSACHUSETTS THIRD PARTY PAYORS, OR, IN THE ALTERNATIVE, TO PERMIT ALL PARTIES TO INTRODUCE TESTIMONY FROM NON-MASSACHUSETTS THIRD PARTY PAYORS** to be served on all counsel of record by causing same to be posted electronically via Lexis-Nexis File & Serve.

/s/ Steve W. Berman

Steve W. Berman